88-2091

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

October Term, 1989

No. ____

ACHILLES CONSTRUCTION COMPANY, INC.,
Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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42 pp

Question Presented for Review.

Whether the Court below erred in enforcing an order of the National Labor Relations Board ("Board") which order (i) was an attempt to achieve ends other than those which can be fairly said to effectuate the policies of the National Labor Relations Act and (ii) which imposed backpay without regard to the employees' actual economic losses.

List of all Parties.

The caption of the case in this Court contains the names of all the parties.

Table of Contents.

Page

Question Presented for Review i

List of all Parties i

Opinion Below 1

Jurisdiction 2

Statute Involved 2

Statement of the Case 3

ARGUMENT:

The Order of the Board, as enforced by the court below, conflicts with the applicable decisions of this court and thus a review on Writ of Certiorari is warranted 7

CONCLUSION. For the foregoing reasons a Writ of Certiorari should issue 14

APPENDIX:

Judgment and Order of the United States Court of Appeals for the Second Circuit, filed March 30, 1989 ..... 1a

Supplemental Decision and Order of the National Labor Relations Board dated July 29, 1988 with attached Supplemental Decision of Administrative Law Judge James F. Morton dated June 30, 1987 ..... 5a

TABLE OF AUTHORITIES.

Page

CASES:

Hassett Maintenance Corp., 260 NLRB 1211 (1982) 11, 12

Kuno Steel Products Corp., 252 NLRB 904 (1980) .. 3

NLRB v. Independent Association of Steel Fabricators, Inc., *et al.* 582 F.2d 135 (1978); *cert. den.* 439 U.S. 1130 (1979) 3

NLRB v. Koenig Iron Works, Inc., *et al.*, 681 F.2d 130 (1982) 5

Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941) 7

Stone Boat Yard, 264 NLRB 981 (1983) 12

Sure-Tan, Inc. and Surak Leather Company v. NLRB, 467 U.S. 883 (1984) 8, 13

Turnbull Enterprises, 259 NLRB 934 (1982) 11, 12

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SUPREME COURT OF THE UNITED STATES

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NO. _____

ACHILLES CONSTRUCTION COMPANY, INC.,

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NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petition for Writ of Certiorari.

Petitioner, Achilles Construction Company, Inc., hereby requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on March 30, 1989.

Opinion Below.

The summary order of the Court of Appeals was rendered on March 30, 1989 and is reprinted in the Appendix

at page 1a. The Decision and order of the Board is reprinted in the Appendix at page 5a and is reported at 290 NLRB No. 34.

Jurisdiction.

The summary order of the Court was entered on March 30, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254 (1).

Statute Involved.

Sections 10(c) and 10(e) of the National Labor Relations Act, 29 U.S.C. Sections 160(c) and (e) respectively, provide in pertinent part as follows:

> (c) If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act:
>
> (e) The Board shall have power to petition any United States court of appeals, or if all the United States courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order,

and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board.

Statement of Case.

In June of 1978, the United States Court of Appeals for the Second Circuit, in enforcing in part and denying enforcement in part, the Board's order in 231 NLRB No. 31 (1977), determined, *inter alia,* that the Independent Association of Steel Fabricators, Inc., bargaining with Shopman's Local 455, ("Local 455") on behalf of Achilles had reached an impasse in bargaining on January 19, 1976 after a six and one-half month strike, *NLRB v. Independent Association of Steel Fabricators, Inc., et al.* 582 F.2d 135 (1978); cert. den. 439 U.S. 1130 (1979). The court, in so doing, found that an impasse had been reached, reversing the Board's contrary finding. The court also refused to enforce that part of the Board's order directing the reinstatement of strikers, inasmuch as it found that there had been no offer to unconditionally return to work.

In order to cure the infirmities in the reinstatement offer, Local 455 made a renewed offer to return to work on behalf of the striking employees. The validity and effect of the offer was in large measure the subject of what has been called the "Separate Proceedings" before the Board, *Kuno Steel Products Corp.,* 252 NLRB 904 (1980). Initially in that proceeding, the Administrative Law Judge was confronted with issues as to whether strikers who had volun-

tarily returned to work prior to Local 455's offer on their behalf, had in fact been fully reinstated. In order to make such determination, he was confronted with the threshold issue of what standard were the interim earnings with the various litigating employers (including Achilles) to be compared. Should they be measured against the 1975 pre-strike earnings of the employees, against the 1975 pre-strike earnings adjusted upward based on adjustments between 1975 and the dates of return to work, against earnings of replacements or against another standard? The Administrative Law Judge opted for the first of such standards. In determining whether full reinstatement had been granted, he measured the wages received after the return solely against those received before the strike. He did not adjust the prestrike wage standard on the basis of any intervening factors such as increases in wages given to replacements for strikers.

The Board, in turn, stated the following in footnote 5 at page 906 of its Decision:

> We agree with the Administrative Law Judge's recommendation that determination whether the total wages and benefits package these employees have received since returning to work is substantially equivalent to the wages and benefits they received prior to the strike—and thus satisfies the full reinstatement requirement—should be considered in the compliance stage of this proceedings.

The Board also stated in footnote 5:

> Since an individual employee may make an unconditional offer to return to work, each individual employee who was reinstated pursuant to an unconditional offer was entitled to full reinstatement to the status quo which he occupied at the time he went on strike.

Footnote 4 of the Supplemental Decision in part, significantly, also provided as follows:

> Our order of course, does not require Achilles to create new jobs for the discriminates or pay them backpay for periods when employment was not available at Achilles' plant. Achilles will be permitted to introduce evidence in the compliance stage of this proceeding concerning the existence of jobs for unreinstated strikers at all material times herein.

The United States Court Appeals for the Second Circuit granted enforcement in *NLRB v. Koenig Iron Works, Inc., et. al.* 681 F.2d 130 (1982). At page 135, it reiterated the backpay formula adopted by the Board:

> He also held the three employers liable for backpay to strikers returning before August 9, 1978; he left to the compliance phases of these proceedings determination of the amount of backpay, which is to be calculated based upon the difference, if any, between compensation that strikers received upon their return to work and that which they received prior to Local 455's strike.

It repeated the Board's determination in this regard at page 136 and stated its agreement with the Board at page 145:

> As to economic strikers who had returned prior to Local 455's August 9, 1978, offer, the Board found Peelle liable for backpay for any differences in compensation between the employees' new jobs and those they held at commencement of Local 455's strike. The Board reached similar conclusions as to the employees who returned to work at Achilles, Master, Roman, Zaffino and Mohawk prior to

> August 9, 1978. The calculation of the exact amount of the employer's liability was left to the compliance phases of these proceedings. 252 N.L.R.B. at 906 N.5.
>
> Lastly, the Board held that, as regards certain strikers who have already returned to work, all six of the above mentioned employers (Achilles, Zaffino, Peelle, Master, Roman and Mohawk) were required to but may have failed to reinstate these workers to positions equivalent to those they occupied when the strike began. 252 N.L.R.B. at 906 N.5. We hold that each of the Board's findings was supported by substantial evidence.

In the instant case, Administrative Law Judge Morton determined that it would be erroneous to use a Backpay Specification to require Achilles to grant fringe benefits that Local 455 could not extract from it both during and after the 1975 strike and further that it would be both erroneous and invidious to require Achilles to grant the same to the strikers, while Achilles at the same time, was neither required to nor was in fact granting such fringe benefits to its other employees. He determined that such use of a Backpay Specification was not consistent with a proceedings designed to remedy discriminatory conduct. The Administrative Law Judge did however ignore footnotes 4 and 5 in their entirety by not using as the appropriate wage standard, the prestrike wages and by not limiting the remedial hours to those actually available during the backpay period. For all practical purposes, he assumed that the strikers would have worked forty (40) hours per week during all weeks of the year, notwithstanding the uncontroverted evidence in the backpay hearing that no such hours were either worked by replacements or even available. The Board in turn, reversed the Administrative Law Judge, holding Achilles responsible for all fringe benefits

(at the maximum contribution level) without considering other benefits provided by Achilles or the actual amounts necessary to make the strikers whole. It affirmed the Administrative Law Judge on the wage issue, not even addressing its own prior direction and that of the Second Circuit that the pre-strike wage standard was to be utilized and only the *actual* available hours during the back pay period were compensable. The effect was to direct Achilles to (i) pay to the strikers, wages for hours of work that were worked by no one and never available to anyone (and at rates higher than previously directed), (ii) to pay the Local 455 Pension Fund, contributions well in excess of those necessary to insure the maximum benefits to the strikers and (iii) to pay to the Local 455 Welfare Fund, contributions for which it would have to pay no benefits to the strikers.

The Board's Decision thus erroneously imposed a back pay liability of in excess of $110,000 (which with interest approximates $200,000). The Court below enforced the Board's Decision concluding that it could not find that the Board's determination and its method of calculations were so irrational as to amount to an abuse of discretion.

Argument.

The Order of the Board, as enforced by the Court below, conflicts with the applicable decisions of this Court and thus a review on Writ of Certiorari is warranted.

This Court held many years ago, that a backpay remedy must be sufficiently tailored to expunge only actual and not merely speculative consequences of unfair labor practices, *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). More recently, this Court held that a six month minimum backpay award in the total absence of record evidence as to the circumstances of the individual employees, constitutes pure

speculation and does not comport with the general reparative policies of the National Labor Relations Act as embodied in Section 10(c) of the Act, *Sure-Tan, Inc. and Surak Leather Company v. NLRB,* 467 U.S. 883 (1984). The Board's Order, enforced by the Court below, recompenses not merely speculative losses, but rather losses shown in the record as not having occurred at all. It does this in four major regards:

I.

Backpay for hours that were neither available to the strikers nor worked by others.

In computing gross backpay, the appropriate measure of hours for which backpay should have been awarded, is the hours actually worked during the applicable backpay period by replacements for the strikers. Such formula represents both the traditional approach in backpay proceedings as well as specific adherence to the Board direction contained in footnote 4 of the Separate Proceedings (*supra*).

The Backpay Specification in this matter concedes that less work was available during the backpay period than theretofore, but for some unknown reason, assumes that each striker would nevertheless have worked full time during that period.

The error in the General Counsel's approach and the Decision of the Board can be garnered from the testimony of the Board's representative at the hearing. He did not match hour for hour and as a result, gross backpay for the strikers included hours that were never worked by anyone. The representative simply assumed, the Specification claimed and the Board ruled that each striker, once recalled, would have worked forty hours per week for the

balance of the backpay period. As an example, although only a total of four hundred forty hours were actually worked by Achilles employees in the fourth quarter of 1982, the Specification sought gross backpay for three strikers at 520 hours each, or 1560 hours in all. Similar calculations were made for other quarters of the backpay period. The representative's explanation was that the Board did not assume the burden of matching up backpay hours with available hours. But by not limiting backpay to these hours actually worked and hence available, the Board's Decision violated that portion of footnote 4 (*supra*) which in part provides as follows:

> Our order of course, does not require Achilles to create new jobs for the discriminatees or pay them backpay for periods when employment was not available at Achilles' plant. Achilles will be permitted to introduce evidence in the compliance stage of this proceeding concerning the existence of jobs for unreinstated strikers at all material times herein.

The Board simply concluded that the strikers would have been assigned to work on a steady basis. Such assumption is contradicted by the record which established the precise amount of hours actually worked by all employees during the backpay period and thus allowed for a ready computation of the hours that would have been worked, in seniority order, by the strikers (assuming no other disability).

The Board failed to make the appropriate analysis of hours and thus required the payment of backpay when employment was not available. Achilles having introduced "evidence in the compliance stage of this proceeding concerning the existence of jobs for unreinstated strikers at all material times herein", and the Board having ignored the same, the Board committed material error; footnote 4 of the Supplemental Decision (*supra*).

II.

Backpay at hourly rates in excess of the hourly rates in effect at the time of the strike.

The Board computed gross wages on the basis of pre-strike wages, increased by allegedly representative increases given during the period between the inception of the strike and the commencement of the backpay period and then increased again by allegedly representative increases during the backpay period. Such formula is in direct contravention of footnote 5 (*supra*). At a very minimum it assumes that increases would have been given prior to the backpay period and therefore should be imputed for the benefit of the strikers for an interim period when the strikers had no right to reinstatement and no right to backpay (*infra*, page 4). The determination in this regard is not only speculative; it is designed to expunge a loss that never even existed.

III.

Backpay in the form of contributions to the Local 455 Welfare Fund for periods during which Achilles' failure to make such contributions resulted in no loss to any striker.

If a striker suffered no illness or injury, then he suffered no loss as a result of Achilles' failure to make contributions to the Welfare Fund. Similarly if the striker had been reimbursed for illness or injury related costs, he suffered no loss as a result of the failure to make such contributions. The sole exception would be that situation where the striker's own premium contributions funded the reimbursement. In such a case, the loss would be the amount of the premium contributions made by the striker himself.

The question then arises as to what is required to make a striker whole if such striker suffers *some* loss as a result of the failure to provide substantially equivalent welfare benefits. The answer is an amount equal to the unreimbursed medical costs incurred by the striker to the extent the same

would have been reimbursed by the Local 455 Welfare Fund (had Achilles made contributions) plus premium costs incurred by the striker in order to obtain reimbursement from other sources for his medical costs. This formula makes the striker whole, *Hassett Maintenance Corp.*, 260 NLRB 1211 (1982); *Turnbull Enterprises,* 259 NLRB 934 (1982). It does not result in a $23,000 windfall to the Local 455 Welfare Fund as directed by the Board.

The Board dismissed this argument by dismissing the precedential value of its own decision in *Hassett Maintenance Corp.* (*supra*) referring to it as a "cryptic" decision. The relevant portion of the Decision reads as follows and deals precisely with the issues being addressed herein:

> To remedy this violation, the Administrative Law Judge recommended, *inter alia,* the Respondent be ordered to pay, at no cost to the employees in the bargaining unit, the contributions to the Fund that it discontinued after January 31, 1980, and to discontinue the Blue Cross/Blue Shield plan which it instituted at that time. However, to require Respondent to pay double insurance premiums by making all contributions for medical benefits for the entire period since January 31, 1980, would impose an undue burden on Respondent. Additionally, such payments would constitute a windfall to the Fund, since Blue Cross/Blue Shield has presumably already paid a substantial portion of the benefits to which employees would be entitled during this period. Thus, we shall not order Respondent to make retroactive payments to the Fund for medical benefits, but shall order Respondent to make the employees in the bargaining unit whole, with interest, for the loss of medical benefits to the extent that costs which would have been paid by the Fund were

not actually paid by the Blue Cross/Blue Shield plan instituted by Respondent.

There is nothing "cryptic" about the Decision; it is perfectly clear. The Board in the instant case elected to rely on *Stone Boat Yard*, 264 NLRB 981 (1983); a divided decision concurred in by two of the three Board members of the unanimous panel in *Hassett Maintenance Corp.*, (*supra*) and *Turnbull Enterprises*, (*supra*). A reading of *Stone Boat Yard* (*supra*) gives no indication that the question of double costs was even considered in the litigation before the Board. On the other hand, it was a pivotal issue in *Hassett Maintenance Corp.*, (*supra*), as well as *Turnbull Enterprises*, (*supra*). Moreover, is it reasonable to believe that in a period of less than two (2) years, two Board members (Fanning and Zimmerman) decided to overrule their earlier decisions, but elected not to mention this fact in their opinion? The simple fact is that *Hassett Maintenance Corp.*, (*supra*) and *Turnbull Enterprises*, (*supra*) are and should have been dispositive of this issue.

Thus the Board directed contributions not to recompense an actual loss, but only as a punitive measure.

IV.

Backpay in the form of contributions to the Local 455 Pension Fund in amounts far in excess of those required to grant to the strikers the maximum pension benefits.

If a striker receives the maximum pension benefits he could receive as a result of contributions to the Pension Fund by Achilles, he suffers no loss regardless of the fact that contributions are being made in the minimum amount required to achieve the maximum benefits. In this case, the Board directed that contributions be made by Achilles in

amounts far in excess of those required to insure to the strikers the maximum benefits. The effect of requiring the greater amount of contributions is to enrich the Fund, but to grant no additional benefit to the strikers.

Once again, no actual loss was recompensed.

That the Court below had a limited function in reviewing the Decision of the Board is beyond question; that the Court in deferring to the Board's discretion and thus enforcing a Decision of the Board which requires Achilles to make substantial payments for losses which were never sustained, erred, is likewise clear. As this Court stated in *Sure-Tan, Inc. and Surak Leather Company v. NLRB* (*supra*), the back-pay award must be tailored to the actual compensable injuries. The enforcement of a Board decision which requires an employer to make compensation for hours that were not and would not have been worked, which requires the payment of an hourly rate in part based on imputing to the strikers raises given to others during a period of time the strikers had no reinstatement or backpay rights, which requires the employer to make contributions to a Welfare Fund although the Fund will not recompense the strikers and which requires the employer to make contributions to a Pension Fund in amounts far in excess of those needed to assure to the strikers the maximum pension benefits, is in conflict with both the Act itself and the decisions of this Court. The flaw in the Court's reasoning rests with its view of its function in this case. The Court examined the Board's Decision to determine whether it had a rational basis. The issue however was not rationality. The issue was whether the Board had the *power* to make a backpay award which required Achilles to make restitution for non existent losses, i.e., the power to issue an award punitive in nature. The Decisions of the Board and Court are not merely erroneous; they represent a dramatic and unauthorized departure from the policies of the Act. The Court, in deferring to the

Board's alleged "discretion", has granted to the Board the authority to impose a punitive as opposed to a remedial remedy. This Court has held that the Act does not permit such a remedy. Thus the Court below in enforcing the Board's Decision, in turn, decided the case in a manner that conflicts with applicable and explicit decisions of this Court and a review on Writ of Certiorari is warranted.

CONCLUSION.

For the foregoing reasons a Writ of Certiorari should issue.

Respectfully submitted,

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APPENDIX.

Judgment and Order of the United States Court of Appeals for the Second Circuit, Filed March 30, 1989.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 30th day of March one thousand nine hundred and eighty-nine.

Present:

Honorable Ellsworth A. Van Graafeiland
Honorable Richard J. Cardamone
Honorable George C. Pratt

Circuit Judges

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

ACHILLES CONSTRUCTION COMPANY, INC.,

Respondent.

Docket No. 88-4156

This action was brought by the National Labor Relations Board pursuant to § 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e), seeking enforcement of a July 29, 1988 supplemental backpay order issued by the Board against Achilles Construction Company. The appeal involves the calculation of backpay for six striking employees and the payment of contributions to certain pension, annuity, and welfare funds by Achilles.

The unfair labor practices underlying this proceeding were committed in July 1975. In *Kuno Steel Products Corp.*, 252 NLRB 904 (1980), the Board found that Achilles had violated 29 U.S.C. § 158(a)(1) and (3) by failing to reinstate striking employees who had unconditionally offered to return to work. The Board's decision required that the employees be reinstated and be made "whole for any and all loss of earnings they may have suffered by reason of the discrimination against them." *Id.* at 907. On June 7, 1982, we granted enforcement of this order against Achilles. *NLRB v. Koenig Iron Works, Inc.*, 681 F.2d 130 (2d Cir. 1982).

The parties were thereafter unable to reach agreement on the amount of backpay owed the "discriminatees." A backpay proceeding was therefore initiated. On May 31, 1984 the Board's Regional Director issued a backpay specification alleging that the six employees were entitled to backpay in amounts totalling $178,617. Following Achilles' objections, a hearing was held before an Administrative Law Judge who held that because Achilles was not required to grant benefits to its other employees, it would be erroneous to require the employer to grant these benefits to the strikers. The Board reversed the ALJ's determination and held Achilles responsible for all fringe benefits as well as wages. The specific amounts owed to each employee are set forth in the Board's order. The total amount owed is $114,925.38 plus interest. In this proceeding, the Board seeks to enforce its order directing Achilles to pay the discriminatees the specified amounts.

The "Board's power is a broad discretionary one, subject to limited judicial review," *Fireboard Paper Products Corp. v. NLRB,* 379 U.S. 203, 216 (1964), and its order "will not be disturbed 'unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.'" *Id.* (quoting *Virginia Elec. & Power Co. v. NLRB,* 319 U.S. 533, 540 (1943)). In general, the Act authorizes the Board, with court approval, to seek to restore the employees to the financial situation they would have occupied were it not for the employer's unfair labor practices. In addition, we have stated that the Board's findings in backpay proceedings will be overturned on appeal "only if we find the method chosen was so irrational as to amount to an abuse of discretion." *Bagel Bakers Council of Greater N.Y. v. NLRB,* 555 F.2d 304, 305 (2d Cir. 1977).

The Board was presented with a variety of methods by which to calculate Achilles' liability, and we cannot find that the Board's ultimate determinations and its methods of calculations were so irrational as to amount to an abuse of its discretion. Accordingly, the award of back pay and the order to pay fringe benefits on behalf of Grover Smith, John Kurn, John Kuzma, Joseph Chopko, Michael Griffin, and Louis Douda are enforced in all respects.

Judgment is therefore entered enforcing the Board's Supplemental Decision and Order.

Ellsworth A. VanGraafeiland, U.S.C.J.
Richard J. Cardamone, U.S.C.J.
George C. Pratt, U.S.C.J.

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

A TRUE COPY
ELAINE B. GOLDSMITH
Clerk

(Stamped): Filed Mar 30 1989
United States Court of Appeals
Elaine B. Goldsmith
Second Circuit

Supplemental Decision and Order of the National Labor Relations, Board Dated July 29, 1988, With Attached Supplemental Decision of Administrative Law Judge James F. Morton Dated June 30, 1987.

Supplemental Decision and Order

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

ACHILLES CONSTRUCTION CO., INC.

and

SHOPMEN'S LOCAL UNION NO. 455, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS, AFL—CIO

Cases 29—CA—6897
29—CA—6934

On June 30, 1987, Administrative Law Judge James F. Morton issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in response to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has

decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Supplemental Decision and Order.

The Respondent's employees, represented by Local 455, the Union, went on strike July 1, 1975. The Respondent subsequently violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union when it requested bargaining in July 1978.[2] In August 1978, the Union made an unconditional offer to return to work. In 1980, the Board found that the Respondent violated Section 8(a)(3) by failing to reinstate fully its striking employees.[3]

Thereafter, the Regional Director issued the instant backpay specification.

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[1]In sec. E, part 3, of his supplemental decision, the judge inadvertently stated that John Kuzma's hourly wage rate would have increased to $10.70 by September 8, 1981, rather than September 8, 1978.

Also in sec. E, part 3, the judge set forth by calendar quarter the amounts of net earnings Kuzma lost as claimed in the amended backpay specification and for which he is entitled to reimbursement. The judge inadvertently excluded the following lost earnings for which Kuzma is entitled to reimbursement as claimed in the amended backpay specification:

Year	Quarter	Amount
1981	2	$3,838
1981	3	2,929
1981	4	4,459
1982	1	4,459
1982	2	4,459
1982	3	2,219

In agreeing with the judge that Joseph Chopko is not entitled to backpay, we rely only on Chopko's testimony that he did not seek interim employment. Michael Griffin's backpay period therefore commences on July 1, 1979.

[2]*Kuno Steel Products Corp.*, 252 NLRB 904, 905 (1980), enfd. *sub nom. NLRB v. Koenig Iron Works*, 681 F.2d 130 (2d Cir. 1982). Achilles Construction Co., Inc. was one of the respondents in *Kuno*.

[3]*Id.* at 905-906.

The judge found that the Respondent must reimburse discriminatees Smith, Kurm, and Kuzma for their net earnings lost. We agree. The judge also found, *inter alia,* that no discriminatee for whom the General Counsel sought backpay pursuant to the make-whole order was entitled to reimbursement for fringe benefits lost as a result of participation in the strike. Additionally, he did not find that John Kuzma and Michael Griffin were entitled to reimbursement of medical expenses. For the reasons set forth below, we disagree with the judge.

1. It is well settled that the "finding of an unfair labor practice . . . is presumptive proof that some backpay is owed by the [Respondent]."[4] The burden is on the General Counsel to prove the gross amount of backpay due.[5] The burden then shifts to the Respondent to establish facts which negate or mitigate its liability.[6]

In analyzing the General Counsel's backpay claims for the discriminatees, the judge acknowledged that the collective-bargaining agreement effective just prior to the 1975 strike provided unit employees various fringe benefits. He also found that the Respondent did not provide these contractual benefits to employees after the strike began. The judge mistakenly stated that the Regional Director's amended backpay specification sought to make the discriminatees whole by requiring the Respondent to provide them the fringe benefits that the Union had established in an industrywide agreement, notwithstanding the Respondent's timely withdrawal from multiemployer bargaining in 1976. The judge then reasoned that requiring the Respondent to provide such benefits would compel the Respondent

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[4]*NLRB v. Mastro Plastics Corp.*, 345 F.2d 170, 178 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966).

[5]*NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 454 (8th Cir. 1963).

[6]*Ibid.*

to grant concessions to the Union, which had not been achieved in negotiations, thereby violating Section 8(d) of the Act.

The amended backpay specification does not seek to impose on the Respondent any terms in the Union's collective-bargaining agreements with other employers; rather, the specification uses a formula based on continuing the terms of the parties' expired agreement. Although the Second Circuit held that the Respondent validly withdrew from the multiemployer group following the 1976 impasse in bargaining between the group and the Union,[7] the Union, as the incumbent, was still entitled to a presumption of majority status among the Respondent's unit employees.[8] The Respondent was, therefore, obligated to bargain on request with the Union as an individual employer because the Respondent did not show a good faith doubt as to the Union's majority status.[9] As the Union retained majority status, the Respondent was obligated to bargain with the Union on its July 1978 request for bargaining.[10] The Respondent was likewise required to continue giving effect to its expired collective-bargaining agreement with the Union until bargaining to impasse.[11] Thus, the amended backpay specification, based on the expired agreement's terms correctly calculated the gross amounts of backpay due. The Respondent, on the other hand, has not established any facts to negate or mitigate its liability.

Specifically, the judge denied all claims set forth in the amended backpay specification for vacation, holiday, and

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[7]*NLRB v. Independent Assn. of Steel Fabricators,* 582 F.2d 135 (2d Cir. 1978), cert. denied 439 U.S. 1130 (1979).

[8]*Id.* at 150.

[9]*Kuno Steel Products Corp.,* 252 NLRB 904, 905 (1980), enfd. *sub nom. NLRB v. Koenig Iron Works,* 681 F.2d 130 (2d Cir. 1982).

[10]*Ibid.*

[11]See *NLRB v. Katz,* 369 U.S. 736 (1962); *Taft Broadcasting Co.,* 163 NLRB 475 (1967).

sick leave pay, as well as contributions to the Union's welfare, pension, and annuity funds. We will, therefore, order the Respondent to make the discriminatees whole by making the contributions to the Local 455 welfare fund,[12] pension fund, and annuity fund on their behalf in the respective amounts set forth in the amended backpay specification, and by paying Louis Douda the amounts set forth in the amended backpay specification for vacations, holidays, and sick leave.

2. The General Counsel has excepted to the judge's failure to include in the make-whole remedy reimburse-

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[12]The Respondent asserts that a discriminatee is made whole when he is reimbursed for the cost of premiums incurred in obtaining substitute health insurance coverage and for his out-of-pocket medical expenses to the extent that those expenses would have been reimbursed through the Local 455 welfare fund. In order to be made whole, however, a discriminatee must be restored to the position he would have occupied had the discrimination not occurred. This includes not only reimbursement of the discriminatee's premiums and medical expenses, but also requires the Respondent to contribute to the welfare fund according to the expired contract's terms so that the discriminatee's future interests in the Fund will be ensured. "[T]he diversion of contributions from the union funds undercut[s] the ability of those funds to provide for future needs." *Stone Boat Yard v. NLRB*, 715 F.2d 441, 446 (9th Cir. 1983).

Hassett Maintenance Corp., 260 NLRB 1211 (1982), a cryptic decision on which the Respondent relies, focused on what it characterized as the double insurance costs that would result from requiring the employer (which had provided other coverage) in that case to make contributions to the welfare fund. *Hassett* did not address restoring the full range of an employee's interests in the welfare fund. The *Hassett* decision did not reconcile its limited remedial order with pre-*Hassett* precedent requiring employer contributions to union welfare funds on employees' behalf, see, e.g., *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), affd. mem. 661 F.2d 940 (9th Cir. 1981), as does precedent decided after *Hassett*. See *Stone Boat Yard*, 264 NLRB 981 (1983), which the Ninth Circuit enforced. The court rejected the double-coverage/punitive claim: the "employer cannot complain of the extra cost of improperly created, substitute fringe benefits . . . . The company is merely required to repay what it has unlawfully withheld." *Stone Boat Yard v. NLRB*, 715 F.2d 441, 446 (9th Cir. 1983).

ment of John Kuzma and Michael Griffin for the purchase of substitute health insurance and out-of-pocket medical expenses incurred during the backpay period. The documented expenses total $1222 and $904.38 for Kuzma and Griffin, respectively. The judge, who, as stated above, dismissed all fringe benefit claims for all discriminatees, did not specifically address medical expenses.

It is customary to include reimbursement of substitute health insurance premiums and out-of-pocket medical expenses in make-whole remedies for fringe benefits lost.[13] Because the Respondent has established no facts that would negate or mitigate its liability, we will order the Respondent to reimburse Kuzma $1222 and Griffin $904.38 for their documented medical expenses during the backpay period.

ORDER

The National Labor Relations Board orders the Respondent, Achilles Construction Co., Inc., Brooklyn, New York, its officers, agents, successors, and assigns, to make whole the employees named below by paying them the amounts of backpay set forth opposite their names, plus interest in the manner prescribed in *New Horizons for the Retarded,*[14] less tax withholdings required by Federal and state law, and by paying to the welfare fund, pension fund, and annuity fund of Shopmen's Local Union No. 455, International Association of Bridge, Structural & Ornamental Iron Workers, AFL—CIO, the respective amounts on their behalf set forth

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[13]See, e.g., *RMC Constructors,* 266 NLRB 1064 (1982).

[14]283 NLRB No. 181 (May 28, 1987). Interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.,* 231 NLRB 651 (1977).

opposite their names, plus interest in the manner prescribed in *Merryweather Optical Co.*[15]

Name	Backpay	Medical Expenses	Welfare Fund	Pension Fund	Annuity Fund
G. Smith	$8,595.50		$ 752.64	$ 940.80	$ 188.16
J. Kurm	4,301.00		524.64	655.80	131.16
J. Kuzma	35,647.00	$1,222.00	5,703.36	7,129.20	1,425.84
M. Griffin		904.38	4,916.16	6,145.20	1,229.04
L. Douda	6,790.50		11,249.20	14,061.50	2,812.30

Dated, Washington, D.C. July 29, 1988

Wilford W. Johansen, Member

Marshall B. Babson, Member

Mary Miller Cracraft, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[15]240 NLRB 1213 (1979).

SUPPLEMENTAL DECISION
UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

ACHILLES CONSTRUCTION CO. INC.

AND

SHOPMEN'S LOCAL UNION NO. 455, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS, AFL-CIO

CASES 29-CA-6897
29-CA-6934

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455, International Association
of Bridge, Structural & Ornamental
Iron Workers, AFL-CIO.

Statement of the Case

JAMES F. MORTON, Administrative Law Judge:

This is a proceeding to determine how much, if any, backpay is owed by Achilles Construction Co. Inc., (herein Respondent) to six employees. Respondent had been

ordered to make them whole for earnings they lost as a result of its having discriminated against them in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (herein the Act). Respondent unlawfully failed to reinstate five of these six employees when they sought to return to work after they had gone out on strike. The sixth employee had been reinstated; the issue, as to him, is whether or not he was fully reinstated.

The hearing in this case was held in New York City in connection with five related cases. It opened on 12 September 1984 and closed on 7 October 1986.

Upon the entire record including my observation of the demeanor of the witnesses, and upon due consideration of the briefs filed by the General Counsel and by Respondent, I make the following:

Findings of Fact

A. Background

As reported in the decision by the Board which underlies this compliance hearing, i.e.- *Kuno Steel Products Corp., et al,* 252 NLRB 904 (1980) and as related in the decision issued in an earlier case, *International Association of Steel Fabricators, et al,* 231 NLRB 264 (1977), Respondent had, before mid-1975, been part of an employer association which bargained with Shopmen's Local Union No. 455, International Association of Bridge, Structural & Ornamental Iron Workers, AFL-CIO (herein Local 455) as the representative of a unit production and maintenance employees employed by the employer- members of that association. A collective bargaining agreement between that association and Local 455 expired on 30 June 1975. Local 455 struck the next day. Respondent, in early 1976, effected a timely withdrawal from the association-wide bargaining. At that time Local 455 was contending that Respondent was still part of the multi-employer bargaining

group. Respondent, since the strike started, put into effect a number of changes in employee benefits. Indeed, as noted recently, Respondent operated for the next seven years as if it were a non unionized company. See JD—(NY)—9—85. Respondent had discontinued contributions to the various benefit plans provided for in the Local 455 contract; it reduced the number of paid holidays, set up its own medical insurance plan and made other changes. It was not until late 1978 or early 1979 that Local 455 requested Respondent to bargain with it as the representative of the unit limited to Respondent's production and maintenance employees. The Board in *Kuno, supra* ordered Respondent to bargain with Local 455 for those employees.

In the amended answer filed by Respondent, it avers that Respondent and Local 455 have not reached agreement on a contract.

The Board, after finding in *Kuno* that Respondent has unlawfully refused, since 9 August 1978, to reinstate five strikers, further noted:

> Our order of course, does not require (Respondent) to create new jobs for the discriminatees or pay them backpay for periods when employment was not available at (Respondent's) plant. (Respondent) will be permitted to introduce evidence in the compliance stage of this proceeding concerning the existence of jobs for unreinstated strikers at all times material therein.

The Board, in *Kuno* also held that several of the employers there, included Respondent, had violated Section 8(a)(1) and (3) of the Act by not having fully reinstated employees who had been on strike but who had returned to work on their own, prior to Local 455's application therefor of 9 August 1978. Louis Dauda is the only one of Respondent's employees affected by that holding. The following

excerpt, from footnote 5 of the *Kuno* decision, is relevant to the backpay claim that General Counsel has asserted on behalf of Dauda:

> The General Counsel presented evidence establishing a prima facie case which . . . (Respondent has) not adequately rebutted, that (one) striker individually returned to work prior to August 9, and (was) not fully reinstated to conditions current at the time the strike began . . . We agree . . . that determination whether the total wages and benefits package (he has) received since returning to work in substantially equivalent to the wages and benefits (he) received prior to the strikers -and thus satisfies the full reinstatement requirement -should be considered in the compliance stage of this proceeding. Under the circumstances of this case, we hold that (Respondent's) backpay liability to (Dauda) should run only from 6 months prior to the filing of the charges herein (N.B. - As the charge was filed 2 January 1979, the backpay period began 1 July 1978).

B. The Wage Claims

The amended specification also seeks backpay for five strikers whom Respondent refused to reinstate on 9 August 1978. Respondent's amended answer places in issue whether there was work available for all of them, whether two had retired, whether another was too ill to work, whether the rates of pay sought by General Counsel for them are appropriate and whether these five were entitled to fringe benefits claimed. These contentions shall be considered insofar as they relate to the respective claims. The striker with the most seniority would have been the first one recalled. His claim is now discussed.

1. Grover Smith

He had worked for Respondent for 31 years as a mechanic when he went on strike on 1 July 1975. His backpay period, according to the Board's decision in *Kuno* began on 9 August 1978 and ended on 31 December 1978 when he would have retired, according to the amended backpay specification.

Respondent asserts that the language of footnote 5 in *Kuno* spells out the appropriate gross backpay formula to be used. That language clearly applies to strikers, such as Louis Dauda, who returned to work before 9 August 1978 and not to the unreinstated strikers, including Smith.

Respondent contends that Smith had retired from active employment prior to the start of his backpay period and urges that he in thus entitled to no backpay. In support thereof, it placed in evidence a questionnaire he signed which was filled out by his wife. Therein is a notation that he had "retired December 31, 1978" and a "No" box is checked alongside a question asking if he was unemployed and looking for work during the backpay period. A "Yes" box was checked alongside another question asking if there was any period after 1 July 1978 when he was unavailable for work.

Smith testified that he had looked for work in the industry but was unsuccessful. He did obtain other work. During the third quarter of 1978 (i.e. - in the backpay period) he had interim earnings which offset in part the gross backpay claimed for that quarter. In the *Kuno* decision *supra,* the administrative law judge noted that, based on the record made before him in September 1979, two of the unreinstated strikers whom he named had retired on pension. Smith was not one of them.

I find that Smith was available for work in 1978; i.e. - during his backpay period. The questionnaire he signed is conclusional and insufficient to offset the simple fact that

he was working in the latter part of 1978 and had interim earnings then. If Respondent had any genuine doubts as to his work availability then, it could have resolved them simply by having offered him reinstatement, instead of by violating the Act as it did.

Smith had been earning $6.70 an hour when he and the other discriminatees were out on strike on 1 July 1975. As noted above, one of the discriminatees, Louis Dauda, returned to work before the strike ended. Dauda received wage increases totalling $1.50 in the interval between his return and the start of the backpay period. General Counsel postulates that Smith would have received similar increases and alleges that as of 9 August 1978 Smith's wage rate would have been $8.20 had he been recalled. Respondent's payroll records, based on the testimony before me, demonstrate that it had a turnover of employees such that Dauda, during the backpay period, was the only one that could reasonably be said to be an employee similarly situated to the unreinstated strikers. I find that, absent the discrimination, Smith would have been receiving $8.20 an hour as of the start of the backpay period. I further find that as Dauda received a further hourly wage increase of $1.00 on 8 September 1978, Smith's hourly rate would have been increased then to $9.20.

Respondent's answer places in issue whether there was any work for Smith in the backpay period. The testimony offered by General Counsel in explication of the amended specification establishes that Respondent had, on its payroll in the backpay period, a number of irregular employees in addition to Louis Dauda and that the hours of these employees were sufficient to have permitted Smith to work a forty hour week, as set out in General Counsel's formula.

I thus find that he would have worked the hours set out in the specification at the rates noted above and thus conclude that his backpay for the last two quarters of 1978, after deducting interim earnings is as follows:

1978, 3rd Quarter—$3,811
1978, 4th Quarter—$4,784

2. John Kurn

Kurn is the next most senior unreinstated striker, in terms of service with Respondent. He was earning $8.90 an hour in 1975 and based on wage increases given to Louis Dauda, as discussed above, I find that Kurn's hourly wage rates as of 1 January 1979 would have been $11.40 and that he would have received a 50 cents an hour increase on 6 August 1981 when Dauda received the same increase.

General Counsel alleges that, upon the retirement of Grover Smith on 31 December 1978 as related above, Kurn would have replaced him as the next senior employee. His backpay period ended on 15 August 1982 upon Respondent's offer of reinstatement.

Respondent, in its answer, asserts that work would have been available for Kurn during the backpay period on a limited basis - e.g. - for 105 hours in the third quarter of 1979. It based this contention on a further assertion that Kurn would have replaced a specifically named employee for the quarter. In support of both these assertions, it offered the testimony of the individual who maintained Respondent's books. Her testimony did not controvert the testimony of General Counsel's witness, discussed above with respect to Smith's claim. The evidence offered by General Counsel and the formula General Counsel proposes give weight to the experience and seniority of the unreinstated strikers and make for a more rational basis to evaluate their backpay claims. Any confusion or uncertainty that exists is not to redound to Respondent's benefit. I find, based on the evidence before me, that Kurn would have, during the backpay period, worked the hours upon which the net backpay claim for him has been predicated in the amended specification. I find applicable thereto are the hourly wage rates

noted earlier. Accordingly, and as set out in the amended specification, Kurn lost net earnings of $4,301 plus interest.

3. John Kuzma

Kuzma is the next most senior of the unreinstated strikers. Based on the wage formula discussed above, I find that his $8.20 an hour wage rate as of 1975 would have been increased by $1.50 to $9.70 by the start of the backpay period, to $10.70 by 8 September 1981 and to $11.20 by 6 August 1981. His backpay period ended on 15 August 1982 when Respondent offered to reinstate him.

Respondent would limit the hours of available work for him to those worked by a specific replacement employed in each of several quarters of the backpay period. I rejected this approach in the section above relating to Kurn's claim for backpay. I accept, instead, the testimony offered by General Counsel that because of high employee turnover, it is appropriate to consider the total available hours of work and allocate these according to seniority and on the premise that the unreinstated strikers would have been assigned to work on a steady basis, as Louis Dauda had been. Thus, Kuzma should be compensated based on the available hours as allowed for him in the amended specification, multiplied by the appropriate wage rate, for each quarter.

Respondent would disallow Kuzma's claim in material part because he had been injured during the course of his interim employment and as a result unavailable then for work. The Board had rejected this argument. See *Big Three Industrial Gas & Equipment Co.*, 263 NLRB 1189, 1200 and the discussion there of the governing principles. I therefore reject this contention of Respondent.

Based on the foregoing, I find that Kuzma is entitled to the net backpay claimed for him in the amended specification.

Year	Quarter	Amount
1979	3	$1,028
1979	4	1,028
1980	1	1,740
1980	2	1,740
1980	3	1,740
1980	4	1,740
1981	1	4,268

4. Joseph Chopko

Chopko earned $8.20 an hour when the strike began. General Counsel contends that he would have been recalled along with John Kuzma on 1 July 1979, inasmuch as Respondent's payroll records disclose that its workforce increased then equivalent to two positions. Respondent asserts that Chopko had retired and was unavailable for employment.

Based on the original hearing in *Kuno,* in February 1979 the Administrative Law Judge observed that Chopko had retired on pension. He was born in 1905 and was 74 when the backpay period began. He had no interim earnings during this backpay period. Indeed, he acknowledged at the hearing that he had not looked for work of any kind.

Based on the foregoing, I find that Chopko had retired from active employment as of about January 1979 before any backpay could be claimed for him and therefore, no backpay is due him.

5. Michael Griffin

General Counsel, in an asterisked footnote to her motion to amend, dated 28 January 1985, states that no backpay, based on lost wages in sought for Griffin as his interim earning equalled or exceeded the gross backpay due him under General Counsel's formula.

6. Louis Dauda

The sixth discriminatee named in the specification, Louis Dauda, had abandoned Local 455's strike long before Local 455 applied for reinstatement of the five employees whose claims were just discussed. The amended backpay specification makes no wage claim for Dauda as General Counsel concedes that he, at all times, had been fully compensated insofar as his wage rates and hours worked are concerned. A claim for fringe benefits however has been asserted for him, as well as for the other five discriminatees. That matter is next discussed.

C. The claims based on fringe benefits

In the amended backpay specification, General Counsel seeks, on behalf of the six discriminatees, payment by Respondent of contributions to a Pension Fund, a Welfare Fund and an Annuity Fund for the period 1 July 1978 to 1 July 1983. Respondent had, under the collective bargaining agreement it had with Local 455, prior to 1 July 1975, contributed to those Funds. General Counsel contends further that other contractual fringe benefits (vacation, holidays, sick leave, overtime pay and so on) also must be compensated for. The rationale offered in support of this contention appears to be that Respondent would thereby remedy the discrimination found by the Board in *Kuno Steel supra.* There, the Board noted that as various reinstated discriminatees employed by several companies (including Louis Dauda, employed by Respondent) were not reinstated to the benefits enjoyed prior to the start of the strike, a *prima facie* showing of discrimination had been made out and as it was not thereafter rebutted by any evidence proferred by any of those companies, Respondent, *inter alia,* violated Section 8(a)(1) and (3) of the Act.

Respondent contends that the Board, in *Kuno,* specifically directed the use of the backpay formula contained in

Respondent's answer, i.e. - that a comparison he made of the total package of wages and benefits paid by Respondent on an after 1 July 1978, with the package as it existed three years before - with no allowance for any wage or other increments in the years between 1975 and 1978. Respondent asserts that such a comparison shows that no backpay is due.

I find no merit in General Counsel's claim for the following reasons. In view of the bargaining history recounted earlier, it is readily apparent that, were Respondent ordered to furnish the discriminatees in effect, with contractual benefits on and after 1 July 1978, it would for all practical purposes be thereby compelled to grant these individuals the benefits of an industry-wide agreement, notwithstanding that, as found by the U.S. Court of Appeals, it had timely withdrawn from multi employer bargaining in 1976. It is not appropriate to use a backpay specification as a vehicle to compel concessions that Local 455 has been unable to secure from Respondent in the course of collective bargaining. Section 8(d) of the Act forbids the compelling of concessions. It would be equally erroneous to provide Dauda and the other discriminatees with a Local 455 fringe benefit package, pursuant to a backpay award, while ignoring Respondent's other employees. Such disparate treatment would itself be invidious and certainly should not be required under an award which is aimed at remedying discriminatory conduct.

I therefore find that the fringe benefits claimed for the discriminatees in the amended backpay specification should be denied.

Upon the basis of the foregoing findings of fact and upon the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[1]

ORDER

Respondent, Achilles Construction Co., Inc., its officers, agents, successors and assigns shall pay the employees named below the amounts listed alongside plus interest as required under the original order:

Grover Smith—$8,595
John Kurm— $4,301
John Kuzma— $35,647

In all other respects, the backpay specification, as amended, is dismissed.

Dated at Washington, D.C. 30 June 1987

James F. Morton
Administrative Law Judge

[1]If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.